In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-176

GEORGE STEVENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of having transported a motor vehicle interstate knowing it to have been stolen, in violation of 18 U.S.C. 2312. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-8a).

1. Relying on *Pate* v. *Robinson,* 383 U.S. 375, petitioner contends that the district court, on its own motion, should have ordered a competency hearing during trial, because petitioner's testimony concerning narcotics use and loss of memory about the crime raised

a bona fide doubt as to his competency.[1] The court of appeals, in its thorough opinion on which we rely (Pet. App. 5a-7a), properly rejected this contention. Even assuming that petitioner had complete amnesia with respect to the events of the offense, that would not have supported a finding of incompetence to stand trial under proper legal standards. *E.g., United States* v. *Sullivan,* 406 F. 2d 180, 185-186 (C.A. 2); *United States* v. *Knohl,* 379 F. 2d 427, 436 (C.A. 2), certiorari denied, 389 U.S. 973. Hence, there was no error in failing *sua sponte* to order a competency hearing.

2. Petitioner also asserts that his counsel was ineffective, and he suggests that the decision below conflicts with the approach taken by the Third Circuit in *Moore* v. *United States,* 432 F. 2d 730, in formulating the standard for assessing ineffectiveness.[2] *Moore* does state the applicable standard in terms different from those of the court below. This case, however, does not properly present a conflict, because, regardless of whether the traditional formulation and that of the

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[1] On motion of petitioner's counsel under 18 U.S.C. 4244, a pretrial competency examination was ordered. The examining psychiatrist reported that petitioner understood the charges against him and the nature of his defense. He also related petitioner's claim of total amnesia concerning the time of the offense and stated that in his view total amnesia was unlikely (Pet. App. 3a).

[2] The issue in *Moore* was whether an untimely appointment of counsel creates a presumption of prejudice that shifts to the government the burden of showing lack of prejudice (432 F. 2d at 732). The court concluded that no such presumption was necessary and that the lateness of appointment is one consideration pertinent to the adequacy of the representation. In reaching this conclusion, the court articulated the standard for adequate representation as "the exercise of the customary skill and knowledge which normally prevails at the time and place" (*id.* at 736).

Third Circuit are substantively different, petitioner received adequate representation.

Counsel's theory of the defense, explained to the court before trial and to the jury in closing argument, was that as a result of petitioner's drug-induced amnesia he was incapable of forming the necessary intent to commit the offense because he did not know at the time he drove the vehicle across the state line on July 13 that it had been stolen on June 23 (Tr. 3-4, 116-125).[3] It appears that petitioner was consulted with respect to this theory and approved it.[4] Petitioner does not assert that counsel failed to explore other possible theories of defense.

Viewed against this background, counsel's asserted failings were not failings at all. His "failure to cross-examine key law enforcement witnesses as to whether petitioner had received custodial interrogation warnings" (Pet. 13) was consistent with the defense theory. Counsel sought to establish through the officers that petitioner was high on drugs on the day of his arrest, and statements made to them by petitioner were used by counsel to advance his argument that petitioner could not have had the necessary intent to commit the offense (Tr. 26-30, 35-36, 119-123). Moreover, Detective Wojciechowski testified that petitioner was advised of his

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[3] "Tr." refers to the transcript of proceedings in this case, a copy of which we are lodging with the Clerk.

[4] The transcript reflects the following exchange (Tr. 3):

THE COURT: Are you happy with having Mr. Brady as your lawyer?

THE DEFENDANT: Well, from the way he explained it to me, I put my faith to him now.

rights before being interviewed (Tr. 32); petitioner even now does not intimate that the officers failed to give him the proper warnings.

Counsel's "concession of petitioner's guilt to the jury" (Pet. 13) was actually no more than a rhetorical suggestion that, even assuming petitioner himself stole the vehicle on June 23, he was not guilty of the offense of interstate transportation on July 13 because he did not then remember that the vehicle had been stolen (Tr. 118-119).

Counsel is charged also with confusing "the elements of and procedures for invoking claims of incompetency to stand trial, insanity as a defense, and diminished intent" (Pet. 14). It is clear, however, that counsel's expressed theory that petitioner did not know the car was stolen was developed consistently and diligently throughout the trial and included even the presentation of expert testimony (Tr. 78-98). Counsel properly moved prior to trial that petitioner be given a psychiatric examination as to competency. He did not at any time raise the defense of insanity (Tr. 4). Nor did he press a tentative suggestion that the issue of petitioner's capacity to form the requisite intent be submitted to the jury separately (Tr. 3-5). There is, in sum, no support for petitioner's assertion that counsel confused the various defenses.

Petitioner argues that counsel should have moved for a competency hearing because he considered petitioner incompetent. This argument turns, of course, on whether there was any foundation for a finding of incompetence to stand trial. Counsel's view was based on petitioner's alleged loss of memory; we have already

shown that amnesia does not render a person legally incompetent.

Petitioner's counsel made a responsible judgment on what the best strategy seemed to be in defending a case in which the evidence against his client was overwhelming, and he developed the defense case with professional care along those lines. That he could not prevail, and that new appellate counsel have a different view of the best strategy, hardly suggests either a "travesty of justice" or a lack of "customary skill and knowledge."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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